(2)

Supreme Court, U.S.
FILED
JUL 5 1996
CLERK

No. 95-1956

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Petitioners,

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARK BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215

STEVEN R. SMITH
Attorney at Law
116 S. Main
P.O. Box 286
Chamberlain, SD 57325
Telephone (605) 734-5581

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

WHETHER SECTION 5 OF INDIAN REORGANIZATION ACT OF 1934, 25 U.S.C. 465, WHICH AUTHORIZES THE SECRETARY OF THE INTERIOR TO ACQUIRE INTERESTS IN LAND "FOR THE PURPOSE OF PROVIDING LAND FOR INDIANS" IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

WHETHER THIS COURT'S SPARINGLY EXERCISED POWER TO GRANT CERTIORARI, VACATE AND REMAND WITHOUT PLENARY CONSIDERATION IS AVAILABLE TO ALLOW A LOSING PARTY TO ALTER A POSITION IT TOOK BELOW AND WHICH IT HAS TAKEN HISTORICALLY AND IN THIS COURT.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	9
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES CITED:

Amalgamated Meat Cutters and Butcher Workmen v. Connally, 337 F.Supp. 737 (D.D.C. 1971) 24

American Power and Light Co. v. S.E.C., 329 U.S. 90 (1946) 13

City of Chicago v. Environmental Defense Fund, ___ U.S. ___, 113 S.Ct. 486 (1992) 25

Field v. Clark, 143 U.S. 849 (1892) 13

Florida Dept. of Business Regulation v. United States Dept. of Interior, 768 F.2d 1248 (11th Cir. 1985) 3, 12, 13, 21, 22

Florida v. Dept. of Interior, 475 U.S. 1011 (1986).....3, 21

FPC v. Hope Natural Gas Company, 320 U.S. 591 (1944) 15

Gulf Oil Corp. v. Copp Paving Co. Inc., 419 U.S. 186 (1974) 19

Industrial Union Department, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980)..... 14

Lawrence on behalf of Lawrence v. Chater, ___ U.S. ___, 116 S.Ct. 604 (1996) 24, 25, 26

Lichter v. United States, 334 U.S. 742 (1948)..... 15

Loving v. United States, ___ U.S. ___, 116 S.Ct. 1737 (1996) 13

NBC v. United States, 319 U.S. 190 (1943).....15, 16

Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987) 11

TABLE OF AUTHORITIES – Continued

Page

Panama Refining Company v. Ryan, 293 U.S. 388 (1935) 13

Russello v. United States, 464 U.S. 16 (1983) 20

Schmidt v. Espy, ___ U.S. ___, 115 S.Ct. 43 (1994) 25

Skinner v. Mid-America Pipeline Company, 490 U.S. 212 (1989) 13, 14

South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs, 22 IBIA 126 (1992) 4

Stutson v. United States, ___ U.S. ___, 116 S.Ct. 611 (1996) 25, 26

Yakus v. United States, 321 U.S. 414 (1944) 15

Statutory and Regulatory References:

25 U.S.C. § 2 20

25 U.S.C. § 9 20

25 U.S.C. § 461 1

25 U.S.C. § 465 ..... *passim*

25 U.S.C. §§ 713f 11

25 U.S.C. 714e(b), (c) 11

47 U.S.C. § 303 16

47 U.S.C. § 303(g) 16

48 Stat. 984 (1934) 2, 18, 19-20

25 C.F.R. 1.2 ..... 13, 21, 22

TABLE OF AUTHORITIES – Continued

Page

25 C.F.R. 151 ..... 20, 22

25 C.F.R. 151.3 21

25 C.F.R. 151.10 ..... 4, 21

25 C.F.R. 151.12 ..... 4, 5

43 Fed. Reg. 32,312 (July 26, 1978) 20

45 Fed. Reg. 62,035 (Sept. 18, 1980) 2, 20

56 Fed. Reg. 32,278 (July 15, 1991) 21

60 Fed. Reg. 32,874 (June 23, 1995) 13

61 Fed. Reg. 27,821 (June 3, 1996) 22

Other Authorities

Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. of Puget Sound L. Rev. 211 (1991) 17

Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. at 1-14 (1934) 2, 16, 17, 19

Hearing before the Committee on Indian Affairs, U.S. Senate, 73d Cong., 2d Sess. on S.2755 (1934) 17

78 Cong. Rec. 11,123 (1934) 17, 18

78 Cong. Rec. 11,732 (1934) 2

1990 Census of Population and Housing, Summary Population and Housing Characteristics, South Dakota, p. 175 3

STATEMENT OF THE CASE

Respondents State of South Dakota and City of Oacoma brought suit against the United States Department of the Interior, invoking federal question jurisdiction and the Administrative Procedures Act (APA). The State and City challenged a decision of the Department of the Interior to take ninety-one (91) acres of off-reservation land, located partially within the City of Oacoma, in trust status for the Lower Brule Sioux Tribe, pursuant to 25 U.S.C. § 465. The United States District Court for the District of South Dakota dismissed the case, sua sponte determining that the APA does not waive the Department of Interior's sovereign immunity, App. 51a[1]; the court rejected the City and State contention that Section 5 was unconstitutional. *Id.* The United States Court of Appeals for the Eighth Circuit reversed. The court of appeals found that the "very broad language of Section 465" contained no "perceptible 'boundaries,' [and] no 'intelligible principles,' " *Id.* at 6a-7a; that the legislative history of the act provided no guidance, *Id.* at 14a; that the Secretary of the Interior had historically "interpreted the statute as broadly as possible, consistent with its literal language," *Id.* at 13a; and that the statute did not provide for judicial review. *Id.* at 14a. The court thus concluded that 25 U.S.C. § 465 is an unconstitutional delegation of legislative power.

1. This case arises in the context of the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, enacted in 1934.

---

[1] The term "App." refers to the Appendix filed as part of the government's Petition.

The bill leading to this Act, as originally proposed, was a far ranging, meticulously organized plan for the reorganization and improvement of Indian tribes that contained constitutionally adequate standards, rule making authority and clear and specific statements of purpose. *See* Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. at 1-14 (1934) (hereinafter House Hearings).

Congress rejected those basic policy choices, however, and the bill was entirely rewritten by those "who objected most strenuously to the original" bill. 78 Cong. Rec. 11,732 (1934). The revised bill "represent[ed] the viewpoint of the *critics*" of the original bill. *Id.* (emphasis added). The clear and specific statements of purpose and salient rule making authority were eliminated, along with most of the original bill, leaving little or no relevant direction to the federal, state or tribal governments. Contrast, House Hearings, *supra*, at 1-14 with 48 Stat. 984 (1934).

2. Following the enactment of 25 U.S.C. § 465, the Secretary of the Interior began to take lands into trust. The Secretary of the Interior, however, failed to promulgate regulations guiding his acquisition of trust lands from 1934 until 1980, presumably in recognition of the fact that Congress had eliminated the rule making power from the original bill. In 1980, the Secretary promulgated certain regulations, but specifically recognized the "discretionary nature of trust land acquisition." 45 Fed. Reg. 62,035 (Sept. 18, 1980). The United States thereafter successfully argued in the circuit court that the new regulations did not confine the Secretary's discretion and that the trust acquisition was, even under the regulations,

committed to agency discretion. *Florida Dept. of Business Regulation v. United States Dept. of Interior*, 768 F.2d 1248, 1256-1257 (11th Cir. 1985). It repeated that argument to this Court in successfully resisting certiorari. *Brief for the Federal Respondents in Opposition, Florida v. United States Dept. of Interior*, No. 85-821, pp. 10-12 (hereinafter *Florida R.B.*) *See Florida v. Dept. of Interior*, 475 U.S. 1011 (1986). The United States maintained this position through 1995, *see* 60 Fed. Reg. 32,874 (June 23, 1995), and indeed throughout this entire litigation, App. 6a, abandoning the position only after it failed to obtain rehearing below.

3. This case arises out of the Lower Brule Sioux Tribe's request that the Department of the Interior place certain off-reservation land owned by the tribe into trust status. According to the United States, the Lower Brule Reservation occupies 235,800 acres; of these acres, 119,900 are in Indian ownership or in federal ownership for Indian use. Pet. at 8. The 1990 Indian population of the Lower Brule Reservation was 994. *See* 1990 Census of Population and Housing, Summary Population and Housing Characteristics, South Dakota, p. 175. According to the Administrative Record, the tribe had constructed an industrial park on the reservation. J.A. 293.[2] The tribe, however, purchased the 91 acres of off-reservation land at issue here and applied to Interior to take the land into trust to create an industrial park. As the opinions indicate, there was controversy on the question of a "Samsonite" factory on the proposed site, App. 48a, and on

---

[2] The term "J.A." refers to the Joint Appendix compiled in the Court of Appeals.

whether the tribe actually intended the site to be used for gambling. *Id.*; *see also Id.* at 3a.

The district court found that neither the Acting Area Director, who was responsible for the initial review of the Agency Superintendent's recommendation, nor the Acting Assistant Secretary-Indian Affairs, performed any significant analysis of the application. The district court described the Bureau of Indian Affairs (BIA) Acting Area Director's memorandum as containing a "brief outline of the documents being forwarded, but no real discussion of the elements of 25 C.F.R. § 151.10." App. 40a. Similarly, the December 13, 1990, memorandum of the Acting Assistant Secretary-Indian Affairs which determined that the land should be taken into trust, "contained no discussion of the factors found in 25 C.F.R. § 151.10. . . . " *Id.* See, *Id.* at 61a. The Acting Assistant Secretary's memorandum of December 13, 1990, stated that the land would be taken into trust after "receipt of satisfactory title evidence in accordance" with 25 C.F.R. 151.12. *Id.* at 62a. No notice of the Assistant Secretary's decision was given to the State of South Dakota or to the City of Oacoma, both of which had protested the application from the very first. *Id.* at 2a; *see also Id.* at 32a-40a. The State was later sent a March 22, 1991, letter of the Area Director informing the Tribe that the land would be taken into trust after certain title problems were addressed. J.A. 366; App. 56a. The State thereafter petitioned the Interior Board of Indian Appeals (IBIA) to review the Area Director's decision, but the IBIA sua sponte dismissed the appeal because the decision actually had been made by the Assistant Secretary-Indian Affairs and such decisions are not reviewable by the IBIA. App. 2a; *South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs*, 22 IBIA 126 (1992), reprinted at App. 55a-60a.[3]

4. Following the dismissal of the State's administrative action, the State and the City on July 13, 1992, filed a Complaint challenging the Assistant Secretary's decision. J.A. 7. Although the Assistant Secretary-Indian Affairs, had stated in his December 1990, memorandum that the lands should not be taken into trust until "satisfactory title evidence in accordance" with 25 C.F.R. 151.12 was received, the United States nonetheless acquired the land in trust on November 30, 1992, even though the instant litigation was then pending. J.A. 349. The United States apparently did not believe that an action in federal court challenging the propriety of an acquisition constituted an "infirmity" on the title. *See* 25 C.F.R. 151.12. The State's Amended Complaint asserted that 25 U.S.C. § 465 "constitutes an unlawful delegation of legislative power from Congress to the Executive Branch. . . . " J.A. 28.

The United States, in accordance with the policy it had followed since 1934, and in accordance with the view it had argued in this Court, *see Florida R.B., supra*, moved to dismiss the action on the grounds that the APA did not

---

[3] As the United States notes, the IBIA determined that it "lacked jurisdiction to review decisions made by the Assistant Secretary, which are final for the Department of the Interior, unless the Assistant Secretary provides otherwise in his decision." *See* Pet. at 9, n.4. The United States neglects to add that Department of Interior policy is that the "discretionary decision on whether to accept" off-reservation land in trust rests with the Assistant Secretary. Thus, the administrative appeal process is generally unavailable with regard to off-reservation transfers. J.A. 264.

authorize judicial review because the matter was "wholly committed to the Secretary's discretion." App. 41a.

The district court did not address this argument but ruled, sua sponte, that the Quiet Title Act precluded the suit. *Id.* at 51a. The district court also rejected the State and City's contention that 25 U.S.C. § 465 constituted an unlawful delegation of legislative power to an administrative agency. *Id.* at 49a-51a.

5. The court of appeals reversed. App. 1a-15a. The majority indicated that the district court likely erred in finding that the Quiet Title Act precluded APA review of "agency action by which the United States acquires title." *Id.* at 4a n.1. *See also Id.* at 30a. (Murphy, J., dissenting.)

Nonetheless, the majority found that judicial review of the agency action was not available, concluding that 25 U.S.C. § 465 provided for "unrestrained power . . . free of judicial review." App. 14a. *See also Id.* at 15a. The court found that "25 U.S.C. § 465, the statute authorizing acquisition of the land, is an unconstitutional delegation of legislative power." App. 1a-2a. The court carefully examined the precise wording of 25 U.S.C. § 465, which allows an acquisition of land "within or without" a reservation "for the purpose of providing land for Indians." 25 U.S.C. § 465, *quoted in* App. 6a-7a. The court recognized that there are

> no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority – except that the acquisition must be 'for Indians.'

App. 7a. The court illustrated the unchecked breadth of the congressional language by commenting that it would permit the Secretary to acquire a "factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe,[4] thereby removing these properties from the state and local tax rolls." *Id.* at 7a. The court noted that the "literal terms" of the statute would likewise allow the purchase of the Empire State Building for a tribal leader.[5] *Id.*

The court also observed that the "legislative history of 25 U.S.C. § 465 suggests that Congress did not intend to delegate unrestricted power to acquire land 'for Indians.' " App. 9a. The court's examination of that history thus "suggest[ed]," *see id.* that the framers intended that the Secretary be enabled to "acquire rural lands suitable for farming, grazing, and logging by Indians. . . . " *Id.* at 11a. The court concluded, however, that "in drafting § 465, Congress failed to include standards to reflect its limited purpose." *Id. See also Id.* at 14a. The court found support for this limited authorization in the fact

---

[4] Indeed, one of the amici below asserted that it had already established a "championship 27-hole golf course" on land acquired in trust under 25 U.S.C. § 465. Brief of Amici Curiae [Jicarilla Apache Tribe et al.] in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 10.

[5] The court thus implicitly acknowledged that the United States had been unable to answer the charge of the State that the statute would allow the Secretary of the Interior to "acquire all or any part of the City of New York, the City of Saint Louis, the City of Rapid City . . . in trust." *See* Appellants' Brief, *State of South Dakota and City of Oacoma v. United States Department of Interior, et al.*, U.S. Court of Appeals for the Eighth Circuit, Civ. No. 94-2344 at 42.

that "Congress in § 465 addressed only one intergovernmental issue – it made the lands taken in trust exempt from state and local property taxes." App. 11a. As the court pointed out, when "industrial or commercial" uses are allowed, "other important issues inevitably arise." *Id.* The court thus drew attention to the fact that a primary issue facing the State and the City after a trust acquisition is whether the State and City will continue to be able to regulate land use, an issue left unanswered by the statute.[6] The court noted that the Department of Interior's Field Solicitor had acknowledged the open nature of the regulatory issue, *Id.* at 11a-12a, *see generally*, J.A. 180-184, and that the result would be that the State and City would be forced to "establish their right to regulate the trust land in court, where BIA will no doubt argue that state and local regulatory powers are preempted." App. at 12a. The court found this to result in a "legislative void" and that

> Congress, not the BIA, and indeed not the courts, should define in the first instance the extent to which lands taken in trust for industrial and commercial Indian use are thereby freed from state and local zoning ordinances, building codes, health and safety regulations, and other exercises of the police power.

Id.

The court then turned to the regulations promulgated by the Secretary. The court essentially determined that these regulations provided no narrowing of the statute,

---

[6] *See* n.9, *infra*.

"consistent with its [the statute's] literal language." *Id.* at 13a.

The court concluded that 25 U.S.C. § 465, as enacted and implemented, resulted in "an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with the separation of powers principles." *Id.* at 14a.

6. The United States applied for rehearing and rehearing en banc. The United States did not retreat from its view that judicial review was unavailable under the statute but instead argued that "if the panel was of the view that the absence of the judicial review would render that statute unconstitutional, it was obliged to construe the Act, if reasonably possible, to allow judicial review in order to preserve its constitutionality." Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc, *State of South Dakota and City of Oacoma v. United States Department of Interior, et al.*, 94-2344 at 15. Rehearing was denied. Of the eleven active judges, four would have granted rehearing en banc. App. 63a.

REASONS FOR DENYING THE PETITION

The United States posits four general arguments for granting the petition. Each is deficient.

A. The Government Has Failed to Demonstrate the National Importance of this Litigation.

The government first insists that 25 U.S.C. § 465 is a central, crucial element of federal legislation. According to the Petition, the section "has great practical significance to the Secretary's day-to-day administration of the IRA." Pet. at 17.

The Petition, submitted in June of 1996, contradicts the commentary to a new trust land rule in April 1996 promulgated by the Department of the Interior. *See* App. 64a-69a. According to the commentary to the rule: "The annual number of tribal requests to place lands in trust is small." *Id.* at 67a. The commentary also asserts that the rule "[d]oes not have significant federalism effects." *Id.* at 66a. The government's characterizations of the statute are contradictory and cannot be credited.

Two additional factors demonstrate the lack of importance. First, the negation of 25 U.S.C. § 465 in no way precludes a tribe or an individual Indian from acquiring land *in fee* on or off a reservation. The only result is that the United States will not routinely take that land *into trust*. For the United States to establish the importance of this provision, it must demonstrate that there is a real necessity for tribes and Indians to hold vast amounts of land in *trust* rather than in *fee*; this it has failed to do.

Second, to the degree that there is a problem, it may easily be handled by Congress which merely is required to enact a constitutionally sufficient statute. Congress has enacted other statutes which appear to be constitutionally sufficient and which allow the taking of land into trust

for certain restored tribes, *see, e.g.*, 25 U.S.C. §§ 713f, 714e(b), (c), and certainly could enact a more generic constitutional statute allowing trust conversions if it so desired.[7]

B. The Government's Arguments with Regard to Non-Constitutional Issues Are without Merit.

The Government contends that the court below erred by not considering non-constitutional grounds relating to judicial review which may have avoided a need for a constitutional decision.

1. The argument that the court should have considered whether the Quiet Title Act precludes judicial review is without merit.

The government contends that the court of appeals erred by failing to consider whether the Quiet Title Act precludes judicial review. The court below, however, clearly indicated that it did not believe that the Quiet Title Act precluded judicial review. *See* App. 4a n.1. But the answer to this question is, in any event, irrelevant to this litigation. Had the court definitively held that the Quiet Title Act *did* preclude judicial review, it could nonetheless have considered the constitutional question. The court, however, considered that the Quiet Title Act did *not* preclude judicial review, and it therefore addressed

---

[7] We note that any retroactivity of the decision below would presumably be limited to a maximum of six years, *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987) and by the principle of latches.

the second question, i.e. whether judicial review was unavailable because the matter was committed to the discretion of the agency. Because it ultimately determined that judicial review was unavailable for that reason, the outcome of the first question was irrelevant.

2. The court determined that judicial review was unavailable because the matter was committed to the discretion of the agency.

The government appears to argue that the court of appeals did not actually determine the question of whether judicial review was unavailable because the matter was committed to the discretion of the agency. The court's opinion, however, indicates otherwise. First, the court found that 25 U.S.C. § 465 created an "unrestrained power . . . free of judicial review." App. 14a. Next, the court "conclude[d]" that 25 U.S.C. § 465 failed three specified "nondelegation criteria," including that relating to judicial review. *Id.* at 15a. The court of appeals moreover found that neither the statute (*Id.* at 9a) nor the implementing regulations (*Id.* at 11a) placed any restraints upon the Secretary. The effect of such findings is to commit the matter to the discretion of the agency and so deprive the courts of judicial review powers. *Florida Dept. of Business Regulation*, 768 F.2d at 1256-1257. That this was the conclusion of the court of appeals is apparent from the plain text of the opinion.

We finally note the incongruity of the present federal position in light of the fact that it had argued to both courts below that this matter was "committed to the agency's discretion;" that the government had convinced

the Court of Appeals for the Eleventh Circuit of the correctness of that position, *Florida Dept. of Business Regulation*, 768 F.2d at 1256-1257; that the government had made the same argument to this Court in successfully persuading the Court to deny certiorari, *Florida R.B.*, at 10-12; and that the government in its regulations has made it clear that those regulations did not impose binding restrictions on it. *See, e.g.*, 60 Fed. Reg. 32,874 (June 23, 1995). *See also* 25 C.F.R. 1.2.

C. The Court of Appeals Correctly Analyzed the Constitutional Issue Relating to 25 U.S.C. § 465.

This Court has recently reiterated that the

> fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity. *Field v. Clark*, 143 U.S. 849, 892 (1892).

Loving v. United States, ___ U.S. ___, 116 S.Ct. 1737, 1744 (1996). *Loving* also stresses that a " 'delegation of power to make the law, which necessarily involves a discretion as to what it shall be. . . . cannot be done.' " *Id. quoting Field*, 143 U.S. at 693-694. *See also Panama Refining Company v. Ryan*, 293 U.S. 388, 421 (1935). *Skinner v. Mid-America Pipeline Company*, 490 U.S. 212, 219 (1989) *quoting American Power and Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946) in turn finds that it is

> constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

Whether consulting the statutory text, the legislative history, or administrative interpretations, no "boundaries of this delegated authority" can be located with regard to 25 U.S.C. § 465.

1. The text of the statute does not limit the delegation to the Secretary.

25 U.S.C. § 465 states:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.
>
> For the acquisition of such lands . . . there is authorized to be appropriated . . . a sum not to exceed $2,000,000 in any one fiscal year. . . .

The text of the statute thus allows the Secretary to acquire "lands . . . for the purpose of providing lands for Indians." The text does not define the " 'boundaries' " of the Secretary's authority, *Skinner*, 490 U.S. at 219. Nor does the text make the "important choices of social policy" or set down an " 'intelligible principle' " either to guide the exercise of discretion, or to assure that a reviewing court is able to test the exercise of power "against ascertainable standards." *Industrial Union Department, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).[8]

---

[8] The dissent below indicated its view that the Secretary's authority to acquire land in trust is "explicitly" limited by the text which authorized the appropriation of only a "limited

The federal argument with regard to the text of the act is not clear, but is apparently that this Court in "numerous rulings" has "consistently upheld broader grants of authority to executive officials." Pet. at 20. The United States cites a quartet of cases, each of which is distinguishable from our own. *Lichter v. United States*, 334 U.S. 742 (1948) clearly relies upon war powers to validate the delegation there at issue. Furthermore, the allegedly broad term, "excessive profits," had already been addressed by a "War Department Directive of August 10, 1942" which was part of the information before Congress. *Lichter*, 334 U.S. at 777. *Yakus v. United States*, 321 U.S. 414 (1944), likewise relies upon war powers not relevant here. Furthermore, the term "fair and equitable" did not stand alone, but rather was further defined by reference to base line prices of 1941, *Id.* at 421, and through a comprehensive listing of purposes. *Id.* at 420. *FPC v. Hope Natural Gas Company*, 320 U.S. 591 (1944), does not appear to have even expressly considered the delegation question. *NBC v. United States*, 319 U.S. 190 (1943) analyzes a statute allowing the Federal Communications Commission (FCC) to regulate broadcast licensing as the "public interest, convenience or necessity" require. These words did not, however, stand alone and the statute also provided that

---

amount of funds with which land could be acquired. . . . " App. 21a. As the United States has admitted in other litigation, however, "the normal practice under 465 [is that] the tribe itself purchased the land and acquired fee title." Defendant's Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, *State of Wisconsin, et al. v. United States Department of the Interior*, No. 96-C-263-S (April 23, 1996) (District Court for the Western District of Wisconsin) p. 13 n.14.

the FCC had the specific power to "[c]lassify" radio stations, to prescribe the "nature of the service to be rendered" by each station, to make regulations "necessary to prevent interference between stations" and also to make special regulations applicable to "radio stations engaged in chain broadcasting." *Id.* at 214-215, *quoting* 47 U.S.C. § 303. This Court also derived the precise definition of the term "public interest" from the terms of the statute itself as the "interest of the listening public 'in the larger and more effective use of radio.' " *Id.* at 216, *quoting* 47 U.S.C. § 303(g).

In sum, this Court upholds statutory language against a delegation challenge only when it contains a discernable "concrete" criterion, *NBC*, 319 U.S. at 216, that has provided the necessary "intelligible principle." *Industrial Union Department*, 448 U.S. at 686. No such criterion lies in 25 U.S. § 465 which provides that the Secretary of the Interior can acquire "lands . . . for the purpose of providing land for Indians."

2. The legislative history of the Act does not provide meaningful guidance.

As we note above, the bill as originally proposed contained clear statements of purpose, specific rule making authority, and constitutionally adequate standards. House Hearings, at 1-14. For example, Title I of the original bill, *Id.* at 1-7, created well defined governmental powers in the tribes.[9] The original bill specifically provided for Indian lands in Title III. *Id.* at 8-11. Section 1 of

[9] The writers of the bill recognized that the tribes in 1933-1934 then had no legitimate claim to real governmental power. *See generally*, Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. of Puget Sound L. Rev. 211, 239-260 (1991). Therefore, the original bill proposed that an Indian community which desired to exercise governmental authority within a particular area would identify that area and apply for a charter to the Secretary of the Interior for that area. *See* House Hearings at 1-3. Senator Wheeler objected, Hearing before the Committee on Indian Affairs, U.S. Senate, 73d Cong., 2d Sess. on S.2755 (1934) at 66-68, and ultimately told the Senate that the Committee had "eliminated from the bill as originally presented the right of the Indians to make laws upon the reservations." 78 Cong. Rec. 11,123 (1934).

Title III set out a detailed declaration of policy. *Id.* at 8. Under Section 6, the Secretary of the Interior was to study the economic and physical characteristics of reservations and create consolidated areas based upon those studies. *Id.* at 8-9. The Secretary was authorized under Section 7 to promulgate "rules and regulations" to guide the acquisition of lands and to acquire lands "for Indians for whom reservation or other land is not now available and who can make beneficial use thereof" and to acquire lands for the purpose of "blocking out and consolidating areas classified for the purpose pursuant to the authority of Section 6 of this title." *Id.* at 9. Under Section 16 of Title III, the United States assumed several specific "governmental obligations of the State or county" with regard to lands under reservation jurisdiction. House Hearings at 11. Title III §§ 6, 11, 14, 15, indicated the importance of farming, grazing and forestry. *See* House Hearings at 8-11.

The original bill thus made the basic policy choices regarding land acquisition but these policy choices were

resoundingly rejected by Congress. Consequently, the bill was entirely rewritten by those "who objected most strenuously to the original" bill and the revised bill "represents the viewpoint of the critics" of the original bill. 78 Cong. Rec. 11,732 (1934). The detailed statement of general "policy" for the act as a whole set out in Title I, Section 1 was eliminated. Moreover, Congress entirely deleted other provisions of Title I, which would have carefully defined the extent of tribal governmental powers, and thus left the federal, state, local and tribal governments in virtual chaos with regard to the extent of their respective governmental powers. See, App. 11a-12a. Various other sections relating specifically to land acquisition were likewise decimated. Section 1 of Title III of the original bill, which set out a comprehensive policy specific to the acquisition of lands, was entirely deleted. Section 3 of Title III of the original bill, which provided for disposal of lands outside of consolidation areas was deleted. Section 6, which provided for the "orderly and sound acquisition" of consolidated lands was deleted. But see, 48 U.S.C. § 984, sec. 4 (voluntary exchanges for "proper consolidation" of lands).

Section 7 of Title III, the predecessor to 25 U.S.C. § 465, was stripped of intelligible standards and renumbered Section 5. Compare House Hearings at 9 with 25 U.S.C. § 465. Critically, the rule making authority under Section 7 was eliminated. The identification of purpose was essentially eliminated and the bill eliminated the statement of standards for land to be acquired. Section 5 of the revised version contains no standards: the language allows acquisitions "for the purpose of providing lands for Indians." 25 U.S.C. § 465. Moreover, Congress

put in limbo the question of whether it would assume the specified "governmental obligations of the State or county" with regard to lands under reservation jurisdiction by eliminating the salient provisions of Section 16 of Title III of the original bill.

Because of the treatment by Congress of the original bill, the legislative history cannot be said to yield intelligible standards.

3. The regulations promulgated by the Secretary do not provide adequate guidance.

The United States argues that regulations promulgated by the Secretary serve to confine the Secretary's discretion under 25 U.S.C. § 465 and so have the effect of making that statute constitutional. The government's argument fails on three points.

a. The Secretary's authority to make rules is doubtful.

The Indian Reorganization Act, as originally proposed, contained specific authority to promulgate "rules and regulations" to acquire lands for specific purposes. *See* Title III, § 7 at House Hearings at 9. This rule making authority was eliminated from the final bill. It therefore appears doubtful that the Secretary has the authority to adopt the regulations in question. *Gulf Oil Corp. v. Copp Paving Co. Inc.*, 419 U.S. 186, 200 (1974). This is especially so because rule making authority was retained with regard to at least one other provision of the bill. *See* 48

Stat. 984, § 6 (1934); *Russello v. United States*, 464 U.S. 16, 23 (1983). *But see* 25 U.S.C. §§ 2, 9.

b. The rules promulgated in 1980 and thereafter were not intended by the Secretary to confine his discretion.

The current position of the government, arguing that the regulations set out in 25 C.F.R. 151 confine the discretion of the Secretary, is anomalous indeed. The first rule which allegedly guided the discretion of the Secretary was promulgated on September 18, 1980, 46 years after the passage of the Indian Reorganization Act. It is a unique argument, accompanied by no authority, that promulgation of a rule 46 years after enactment of a statute can have the effect of "constitutionalizing" a statute. In any event, the Secretary's commentary on the 1980 rule drew attention to the "discretionary nature of trust land acquisitions. . . . " 45 Fed. Reg. 62,035 (Sept. 18, 1980).[10] Five years later, the United States successfully argued that trust acquisitions were "committed to the Secretary's discretion" and did not provide law that a reviewing court could apply. *Florida Dept. of Business Regulation*, 768 F.2d at 1256. The United States repeated that argument to

[10] An additional anomaly is that in 1978, the rule was formally proposed and the Secretary noted that the provisions of the proposed rule relating to acquisitions for tribes "reflect the policy expressed in *recent acts* of Congress authorizing acquisition of lands for tribes." 43 Fed. Reg. 32,312 (July 26, 1978) (emphasis added). The reference to "recent acts" may *not* have included the Indian Reorganization Act, which had been enacted 44 years prior to the 1978 rule.

this Court, *see Florida R.B.*, at 10-12, and this Court ultimately denied certiorari. *Florida v. Department of Interior*, 475 U.S. 1011 (1986). The Secretary in 1991 repeated that the "Secretary is vested by statute with broad discretionary authority to accept land in trust status. . . . " 56 Fed. Reg. 32,278 (July 15, 1991), and referred to the "discretionary decisions" made by the Secretary. *Id.* In 1995, the Secretary asserted that "the decision whether to accept title in trust status is a discretionary one. . . . " 60 Fed. Reg. 32,874 (June 23, 1995). *See also* 25 C.F.R. 1.2.

c. The regulations do not confine the discretion of the Secretary in any event.

The Secretary and the courts have agreed that the Department of Interior's regulations do not provide standards which are enforceable in court and that the regulations commit the decision on whether to take land into trust to the discretion of the Secretary.

This conclusion follows from the text of the regulations. The government nonetheless contends that 25 C.F.R. 151.3 states a "general policy regarding trust land acquisitions. . . . " Pet. at 6. This section allows the Secretary, inter alia, to acquire land in trust for a Tribe when the Tribe already "owns an interest in the land." This is no constraint at all. *See* n.8, *infra*.

The Petition also appears to rely upon the factors set out in 25 C.F.R. 151.10. This section simply lists the factors which the Secretary shall "consider" and does not set any limitations on the Secretary's authority. Thus, while the Secretary is to *consider* the "purposes" to which the land will be used, the regulation does not set any *limit* on

those purposes. As found by *Florida Dept. of Business Regulation*, 768 F.2d at 1256-1257:

> The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor. Nor does it mandate that the Secretary not acquire lands located in particular areas, or limit the size of acquisitions. The factors listed in the regulation are not the kind of legal principles courts are familiar with applying to a particular case.

Reinforcing the discretionary nature of the Secretary's decision are the provisions of 25 C.F.R. 1.2 which provide authority to the Secretary of Interior to "waive or make exceptions" to any provision of the pertinent chapter of the Code of Federal Regulations if the Secretary finds it is in the best interest of the Indians and would not violate any federal statute or the constitution. The Secretary thus in one broad regulation made the remainder of Chapter 1 of 25 C.F.R. (which includes 25 C.F.R. 151) discretionary. *See Florida Dept. of Business Regulation*, 768 F.2d at 1250; *Florida R.B.*, at 11-12. The Secretary on June 3, 1996, proposed a style and form change to 25 C.F.R. 1.2, but did *not* seek to alter its content. 61 Fed. Reg. 27,821 (June 3, 1996).

D. Remand of this Case to Allow the Losing Party, the United States, to Shift its Position so as to Bolster its Case on the Merits, Is Singularly Inappropriate.

The final argument of the government essentially asks this Court to surrender control of its docket to the Solicitor General by granting certiorari without considering the merits, vacating and remanding to the Administrator. This would give the government the opportunity to change the position on judicial review it has historically taken and which it successfully induced at least two courts of appeals to adopt. This unprecedented plea of the government should be rejected.

More specifically, the government argues that because "the court of appeals based its assumption of non-reviewability on the government's argument," Pet. at 24, and because the government, after suffering defeat on its petition for rehearing has "abandoned" that position, *id.*, and because the Secretary of the Interior has issued a new regulation, the matter should be remanded.

First, there are no grounds for remand simply because the United States wishes to abandon a position it successfully pursued at the court of appeals but which contributed to its ultimate defeat. The government cites no precedent for this striking position. Furthermore, the implicit argument of the government, i.e., that the court of appeals did not actually find that the matter was non-reviewable, is without merit. The court of appeals below clearly found that 25 U.S.C. § 465 created an "unrestrained power . . . free of judicial review." App. 14a. *See also, Id.* at 15a. *See* Argument B, *supra*. The real federal

complaint is that the discussion of the issue was not thorough enough for the United States, but this does not constitute grounds to grant certiorari. *Lawrence on behalf of Lawrence v. Chater*, ___ U.S. ___, 116 S.Ct. 604, 609 (1996). As we have noted above, for the United States to seek a remand is all the more striking because the decision of the court of appeals below on judicial review corresponds with the position the government has taken historically and in this very Court. *Florida R.B.*, pp. 10-12.

Furthermore, the regulation adopted by the Secretary on April 24, 1996, *see* App. 64a-69a, does not provide grounds for granting certiorari, vacating and remanding. (GVR). The purpose of the rule is to provide a "30-day waiting period after final administrative decisions to acquire land into trust." App. 64a. *See also Id.* at 68a-69a (text of new regulation). The rule is irrelevant to this proceeding because *it does not create any standards for determining if land should be taken into trust. Id.* The commentary to the rule asserts, in an *ipse dixit* and for the first time in the rule making process, that judicial review is available, App. 66a, but does not create enforceable standards. Providing time for an appeal without standards is irrelevant and indeed may properly be termed destructive. In *Amalgamated Meat Cutters and Butcher Workmen v. Connally*, 337 F.Supp. 737, 755 (D.D.C. 1971), the three-judge court said:

> If the courts are open only nominally, they would enhance rather than inhibit executive absolutism.

The government argues that it is appropriate to GVR in light of several cases it cites at Pet. at 25, n.14. The government's contention that these cases support this

action is groundless. *In each of the cited cases in which the government was a litigant, the government obtained the GVR it sought after it had been successful below. Here, the government lost.*[11]

That GVR should not be used to provide a losing party a "second chance" is clear. As Justice Scalia stated in dissent in *Stutson v. United States*, ___ U.S. ___, 116 S.Ct. 611, 615 (1996) (Scalia, J., dissenting):

> But the fact that the party who *won below* repudiates on certiorari its position on a particular point of law does not give rise to any "intervening," postjudgment factor that must be considered. (Emphasis added.)

It follows that the fact that a party who *lost below* repudiates its position on a particular point of law does not give rise to any "intervening" post-judgment factor that must be considered. No case cited has, in fact, suggested that GVR is a proper device to allow a litigant who *lost* to take a new position in this Court especially when the litigant has, on a prior occasion, successfully resisted certiorari using the now repudiated position. *See, Florida R.B.*, pp. 10-12.

This case thus falls clearly within the language of *Lawrence*, 116 S.Ct. at 607 which states:

---

[11] In one of the cases, *City of Chicago v. Environmental Defense Fund*, ___ U.S. ___, 113 S.Ct. 486 (1992) GVR was granted to the benefit of a losing party on the basis of an EPA memorandum, but the EPA itself was not a litigant. In a second case, the United States had been partially successful below and appeared in this Court as a Respondent only, or, in other words, as a successful party. *Schmidt v. Espy*, ___ U.S. ___, 115 S.Ct. 43 (1994).

> Whether a GVR order is ultimately appropriate depends further on the equities of the case: if it appears that the intervening development, such as a confession of error in some but not in all aspects of the decision below, is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.

The contention by the United States that a GVR is justified because, after rehearing in the Court of Appeals, it has changed its position, is the ultimate "unfair or manipulative litigation strategy." Allowing the United States to profit by this device will most certainly encourage the government "to take full advantage of the opportunity to wash out, on certiorari, disadvantageous positions it has embraced below; and we can expect it to focus less of its energy upon getting its positions 'right' in the Courts of Appeals." *Stutson*, 116 S.Ct. at 617 (Scalia, J., dissenting).

Finally, we note that even if a GVR might in some circumstances be available to a losing party, the government has failed to demonstrate that its last minute change of heart raises a "reasonable probability" that the court of appeals would change its decision; this further precludes the grant of a GVR here. *Lawrence*, 116 S.Ct. at 609.

This case squarely presents the constitutionality of 25 U.S.C. § 465. The case was decided by the Court of Appeals for the Eighth Circuit and the rehearing en banc

sought by the United States was denied. While we suggest that plenary review is not justified because the decision below was clearly correct and because of the lack of proven importance of this decision, we also stress that the use of the device of the GVR in this situation would effectively undermine the Court's control of its docket, place litigants other than the federal government in a perpetually compromised position, and encourage manipulative litigation techniques on the part of the federal government.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition For Writ Of Certiorari be denied.

Respectfully submitted,

Mark Barnett
Attorney General
Counsel of Record

John Patrick Guhin
Deputy Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

Steven R. Smith
Attorney at Law
116 S. Main
P.O. Box 286
Chamberlain, SD 57325
Telephone: (605) 734-5581